MITIGATION OF DAMAGES OR SUBSTITUTED CONTRACT.—It is a well settled rule of damages that a party to a contract is required to use reasonable diligence to mitigate damages caused by his obligor's breach. *Creve Coeur Lake Ice Co.* v. *Tamm,* 90 Mo. App. 189; *Warren* v. *Stoddard,* 105 U. S. 224; *Wicker* v. *Hoppock,* 6 Wall. 94; *Deere* v. *Lewis,* 51 Ill. 254. According to *Lawrence* v. *Porter* (1894), 63 Fed. 62, 11 C. C. A. 27, this duty requires the buyer, upon a breach by the seller of a contract to sell goods upon credit, to accept the latter's unconditional offer to sell at a reduced price for cash on delivery, when he is able to accept it and the goods are of a kind and quality not purchasable from other parties. In this last case, the vendor agreed to furnish lumber on credit. After having delivered a portion of the lumber, he notified the vendor that thereafter he would demand cash, the price to be equal to that in the first contract less the interest that would have accrued. It may be observed that there are at least three controlling features in the decision in this case. In the first place, the offer must be one to mitigate and not to substitute; it must be unconditional and not conditional; and, lastly, it must be without abandonment or waiver. A fourth essential might well be inferred from the whole case and that is that the offer must be beneficial in order to make its acceptance necessary.

Prior to *Lawrence* v. *Porter, supra,* a decision was rendered in Iowa involving facts identical with that in the Federal case, the court, however, arriving at the very opposite conclusion. And the same is true of a Minnesota decision handed down some years after *Lawrence* v. *Porter.* In the former case, *Cook Mfg. Co.* v. *Randall* (1883), 62 Iowa 244, 17 N. W. 507, the vendor refused to furnish on credit but offered to deliver the same goods at a cash rate. *Held,* not necessary to accept the latter offer, "for to say that they must accept is to deprive them of the very benefits the contract contemplated they should receive; * * * it is not within the bounds of reason." The court viewed the second offer, if accepted, as a substitution of the first, the very opposite conclusion to that in *Lawrence* v. *Porter.* The same conclusion is reached in *Coxe Bros. & Co.* v. *Anoka Waterworks, Etc. Co.* (1902), 87 Minn. 56, the vendor refusing to further comply with the credit contract but offering a reduced price on cash terms, the reduction being equal to the interest. Here the court based its decision on the fact that an acceptance of the second contract would have been substitution and not mitigation, although they did say that another reason for not applying the rule in *Lawrence* v. *Porter* was that there was nothing to show that the same quality of coal could not have been obtained from other parties. The judge took occasion to say that the rule in the case referred to was "somewhat striking" because it "strikes out" of the contract one condition and substitutes another to which the parties never agreed. *Whitmarsh* v. *Littlefield* (1887), 46 Hun 418, follows the two State decisions just cited, holding the second contract would be a substitution and not mitigation.

Several decisions in State courts, including one recently rendered, have gone so far as to hold that even if an offer is made by the vendor, after a breach on his part, to furnish the material at a price less than the market price, or if the vendee be at fault and offers to pay a price greater than the

market price, the party injured is not bound to accept, for such acceptance, contrary to *Lawrence* v. *Porter*, would result in substitution and not mitigation. *Krebs Hop Co.* v. *Livesley* (Ore. 1911) 118 Pac. 165, illustrates the latter half of this proposition, for here, even though the vendee offered to pay more than the market price, after himself causing the breach, the refusal of the seller to accept the purchaser's second offer could not deprive him of the right to recover the difference between the contract and market prices at the time and place of delivery. And in *Havemeyer* v. *Cunningham* (1861), 35 Barb. 515, involving the very converse of these facts, as in this case the vendor was guilty of a breach but offered to sell to the vendee of the original contract at a price below the market on the day of delivery, the same conclusion was reached. In a case, the facts of which seem to stand on a middle ground as regards the two cases just cited—breach by vendor and later his offer to furnish ice at the original contract price—the same conclusion by means of the same line of reasoning was reached. *Creve Coeur Lake Ice Co.* v. *Tamm* (1901), 90 Mo. App. 189. In the first two of these cases at least, if not in the third, it would have been beneficial to the party guilty of the breach to have had his offer accepted. However, the courts were so firmly impressed by the fact that a substitution would have resulted, rather than mitigation, that they refused to accept a doctrine that seems to be directly deducible from *Lawrence* v. *Porter*.

And it is a very noticeable fact that even the Federal courts, in which the rule was conceived, proceed with great caution in its application. This is brought out vividly in the very recent case of *Campfield* v. *Sauer* (C. C. A., 6th Cir. 1911), 189 Fed. 576. Sauer contracted to furnish Campfield with lumber required on a building contract, but, on an advance in the market, the vendor refused to make further deliveries unless the vendee paid the price. This Campfield refused to do, and, in a suit for the unpaid price of lumber furnished under the contract, counterclaimed for damages for breach of the contract the loss from delay. It did not appear that the defendant could not have obtained the lumber elsewhere in time to prevent the alleged delay after the plaintiff's refusal to furnish, although the evidence in regard to this fact was not very clear. The court, while not at all disaffirming *Lawrence* v. *Porter* allowed the counterclaim, saying that the facts were different from *Lawrence* v. *Porter* in that the offer here was conditional rather than unconditional; also, that it was not shown that the lumber could not have been obtained elsewhere than from the original vendor.

Coulter v. *Thompson Lumber Co.* (1906), 142 Fed. 706, and *Hirsch* v. *Ga. Iron & Coal Co.* (1909), 169 Fed. 578, are both cases in which *Lawrence* v. *Porter* was cited and in each instance approved. However, in the latter case, Judge LURTON, who rendered the decision in *Lawrence* v. *Porter,* said: "The duty imposed by the equitable rule referred to (in *Lawrence* v. *Porter*) must be held within reasonable bounds; * * * when our civilization rises to the standard of the Sermon on the Mount the courts will be willing to require one to yield to another rather than stand upon the letter of his rights."

It can be deduced from the cases cited both from the Federal and State

courts that the principle underlying decisions of this nature is the well known rule of damages that due care must be exercised in keeping the damages as low as possible. In the application of this rule, however, it does seem that *Lawrence* v. *Porter* has gone too far, for surely it is anything but reasonable to ask a vendee to accept an offer of his vendor after the latter has refused to carry out the previous agreement. The mere fact that the goods could not have been obtained elsewhere does not lessen the unreasonableness of the conclusion reached in the case. The decisions in the State courts involving the same facts as *Lawrence* v. *Porter*, and also those in the Federal courts in which the application of *Lawrence* v. *Porter* has been refused, are more in accord with the rule as well as with the seeming justice of the matter. As for the three cases cited, in each of which it would have been beneficial to the obligor if the other party to the contract had accepted the offer made after the breach, the courts evidently lost sight of the beneficial doctrine, although they did reach conclusions that cannot be challenged. The difficulty which is to be found in every case of this nature is based upon what is meant by "reasonable diligence," for if the exact meaning of the word "reasonable" can once be decided, it would be easy enough to apply the facts in the case at hand and arrive at a just conclusion. A. E. M.

LIMITATION OF THE AMOUNT OF A CARRIER'S LIABILITY.—Plaintiff shipped by express a carload of automobiles and appurtenances, valued at more than $15,000. The bill of lading contained the terms, usually found in express receipts, providing that the company should not be liable for any loss not proved to have been caused by the fraud or gross negligence of the company or its servants; nor in any event beyond the sum of fifty dollars unless a different value was thereinbefore stated. The goods were fully described in writing with the additional statement "Value asked and not declared." Plaintiff had been accustomed to put a valuation upon shipments, but had changed his practice in order to secure a lower carrying charge. In an action for the full value a judgment for $50 was rendered. Plaintiff brings error. Judgment below affirmed. *George N. Pierce Co.* v. *Wells Fargo & Co.*, 189 Fed. 561.

This case goes the full length of upholding stipulations limiting the amount of the carrier's liability for loss or damage to goods shipped. If goods worth $15,000, described in writing as a carload of automobiles and appurtenances, whose value the carrier must have known to be not $50, but many thousands of dollars, can be valued at $50 in consideration of a reduced carrying charge, then in consideration of further reduction the value, as is said by NOYES, J., in his dissenting opinion, might have been put at a penny. And if that may be done it is difficult to see why the doctrine of the *Lockwood* case, 17 Wall. 357, has not been wholly nullified. Indeed the present case goes far to work such a nullification, for a recovery of $50 for goods known to be worth $15,000 is really no recovery at all. Furthermore, if it be held not only that it is competent for the shipper to release the carrier from $14,950 of his liability in return for a lower carrying charge, but also that